

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1325 OF 2019

Prakash Narayan Joshi	 Appellant
v/s.	
The State of Maharashtra and anr.	 Respondents

Mr. Kapil P. Dave for the Appellant.
Mr. P.H. Gaikwad, APP for the State.
Mr. Sachin Gite for Respondent No.2.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 10th DECEMBER, 2021.

ORAL JUDGMENT :-

. This is an Appeal under section 374 of Cr.P.C. directed against the judgment dated 23/09/2019 in POCSO Case No.97/2015, Greater Bombay.

2. By the impugned judgment, the learned Special Judge under Protection of Children from Sexual Offences (POCSO) Act, 2012, Greater Mumbai has held the Appellant (hereinafter referred to as 'the accused') guilty of offences under sections 6 and 10 of POCSO Act, 2012. The accused has been sentenced to suffer rigorous imprisonment for 10 years with fine of Rs.1,000/- in default 07 days

simple imprisonment for offence under section 6 of POCSO Act and 05 years rigorous imprisonment with fine of Rs.500/- in default simple imprisonment for 07 days for offence under section 10 of POCSO Act.

3. The case of the prosecution in brief is as under :-

The victim (PW2), the minor daughter of PW1 – Mansi was 3½ years and a student of Jr. Kg. class in Green Lawns High School. On 09/09/2014, when she returned from school, she complained of pain in her vagina. Upon being questioned, PW2 disclosed to her mother (PW1) that one ‘blue uncle’ (attendant of the school bus in blue uniform) had sexually abused her. PW1 initially took her daughter to a family Doctor. PW3 – Dr. Pradeep Doshi examined the child and noticed that there was swelling in the vagina. PW1 therefore lodged the First Information Report (Exhibit – 12) against the accused, who at the relevant time was the attendant of the school bus. On the basis of the said FIR, PW7 – Pramila Kshirsagar, PSI, Gaondevi Police Station, registered C.R.No.164/2014 for offences under sections 376, 354, 506 of IPC and sections 4 and 8 of the POCSO Act. She recorded the statement of the victim, conducted the scene of offence

panchanama (Exhibit – 17), arrested the accused and seized the clothes of the accused as well as clothes of the prosecutrix. She referred the victim and the accused for medical examination, recorded statements of the witnesses and upon completion of investigation, filed the charge sheet against the accused for offences under sections 354-D and 376(2) of the Indian Penal Code r/w. Section 6 and 10 of POCSO Act, 2012.

4. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case, examined 10 witnesses. The statement of the accused was recorded under section 313 of Cr.P.C. The accused examined DW1 – Ashwini Mahesh Gorule, a lady attendant of the school bus. After appreciating and analyzing the evidence on record, the learned Special Judge held that the victim (PW2) was a child within the meaning of section 2(d) of POCSO Act. Relying upon the evidence of the victim and her mother (PW1) and the medical evidence, the learned Judge held that the prosecution has established that the victim was subjected to penetrative sexual assault. The learned Judge therefore convicted and sentenced the accused as stated above. Being aggrieved by the conviction and sentence, the accused has filed this Appeal.

5. Mr. Kapil Dave, learned counsel for the accused has assailed the judgment mainly on the ground that the identity of the accused has not been established. He further submits that the evidence of the School Teacher, PW6 - Pooja and the Lady Attendant, DW1 – Ashwini amply proves that after the school hours, the school teacher had handed over the child to the lady attendant and that the lady attendant had made her sit in the school bus. He submits that the evidence on record indicates that there were other children in the school bus and it would not have been possible for the accused to commit the alleged offence in the school bus at the time mentioned in the FIR. He further contends that the learned Judge has failed to appreciate that the medical evidence does not support the case of the prosecution, on the contrary, indicates that the swelling of the vagina could have been caused by worm infestation.

6. Mr. S.V. Gavand, learned APP and Mr. Sachin Gite, learned counsel for Respondent No.2 submit that PW1 has disclosed the name of the accused in the FIR. They have contended that the accused who was an attendant on the school bus was known to PW1 since he used to always drop the victim at the bus stop. PW1 knew the name of the accused as Prakash Joshi from the logo on his uniform. Learned APP

and learned counsel for Respondent No.2 have further submitted that the evidence of the victim which is duly corroborated by medical evidence, amply proves that the accused was involved in subjecting her to penetrative sexual assault. It is contended that the victim had no reason to falsely implicate the accused and as per the settled proposition of law, conviction can be based on the sole testimony of the victim. It is submitted that the testimony of the victim is reliable and trustworthy and as such, no case is made out to interfere with the conviction and sentence imposed by the learned Judge.

7. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

8. The charge against the accused is that he had sexually abused PW2 who was a child within the meaning of section 2(d) of POCSO Act. The evidence on record indicate that the victim was born on 21/04/2011. The alleged date of the incident was 09/09/2014. The victim was 3 ½ years of age as on the date of the incident and hence, a 'child' within the meaning of section 2(d) of POCSO Act.

9. It is the case of the prosecution that on 09/09/2014, after

school hours, i.e., between 10:20 to 10:30 hours, the accused took the victim to the rear seat of the school bus, removed her shorts and knicker and inserted his fingers in her vagina and thereby committed an offence of aggravated penetrative sexual assault.

10. PW1 – Mansi is the mother of the victim. She has deposed that the victim (PW2) was a student of Jr. Kg. in Green Lawns High School. She used to commute to school by school bus. She used to take bus no.24 at about 07:30 a.m. and return home at 11:00 a.m. by bus no.9. She has deposed that bus no.24 had one male and one lady attendant whereas both the attendants on bus no.9 were male. She has deposed that the male attendant used to wear blue uniform whereas the driver used to wear brown colour uniform. She has deposed that her daughter would refer to the male attendant as 'blue uncle'.

11. The evidence of PW1 indicates that on 09/09/2014, her daughter (PW2) returned home at about 11:00 a.m. by school bus no.09. At about 05:45 p.m., her daughter complained of pain in her vagina. When questioned, she told her that the 'blue uncle' in the school bus had taken her to the rear seat of the bus, removed her shorts and underwear and inserted his fingers in her vagina. The said

incident lasted for about 3 to 4 minutes. PW2 further narrated that when she screamed, the 'blue uncle' threatened her not to disclose the said incident to anyone. PW1 has also claimed that her daughter had also stated that 'blue uncle' had opened his zip and placed his private part (penis) in her hand. The victim further told her that such incident had also occurred earlier at which time the other 'blue uncle' and the driver were standing next to him.

12. PW1 took her daughter to the family physician, (PW3) - Dr. Pradeep Doshi. He examined the victim and told her that there was swelling in the vagina. She informed her husband and father-in-law about the same. PW1 has deposed that the victim did not know the name of the accused but she knew him by face. PW1 has deposed that the accused was an attendant on the school bus and that he used pick and drop the victim at the bus stop. She has further stated that she had seen his name on the logo of his uniform. Hence, she lodged the FIR at Exhibit – 12 against the accused at Gaondevi Police Station for subjecting her minor daughter to penetrative sexual assault.

13. PW1 has further deposed that the accused was called at the police station on 10/09/2014 during early hours and that her daughter

had identified him as the same person who had subjected her to sexual assault. In her cross-examination, she has stated that the school timings of her daughter were till 10:30 a.m. and that the bus would reach the bus stop near her residence at about 11:00 to 11:15 a.m. She has stated that on 09/09/2014, the bus reached the bus stop at the regular time. She has further stated that there was no lady attendant in the said bus. She has further admitted that her daughter had told her that at the relevant time, there were two 'blue uncles' and one 'brown uncle'. She has admitted that her daughter had not disclosed the name of the person referred to as 'blue uncle'.

14. The victim (PW2) has deposed that she used to travel by the school bus. There used to be one 'blue uncle' and one lady attendant in the bus. The said lady attendant used to take the children to the bus and help them board the bus. She has stated that on the relevant day, there were two 'blue uncles', one lady attendant and a driver in the school bus. She has deposed that one of the 'blue uncles' took her to the rear seat of the bus, removed her shorts and underwear and inserted his index and middle finger in her vagina. She has stated that at the relevant time, the lady attendant was not in the bus and that the other 'blue uncle' had gone to bring the other children and the

‘brown uncle’ (the driver) was fixing the bus and was looking out of the bus. She has disclosed the name of the said ‘blue uncle’ as Prakash. She has identified the accused in the Court. She has stated the even on earlier occasions, the accused has committed similar acts.

15. In her cross-examination, PW2 has admitted that her classmates also commute to school by school bus. She has admitted that lady attendant picks them up after school hours and helps them board the bus. She has stated that she does not know the name of the lady attendant, the driver of the bus and the other ‘blue uncle’. She has deposed that there are two ‘blue uncles’ in the school bus and one of them is the accused. She has stated that she did not know the name of the accused and has admitted that her mother had told her that the name of the ‘blue uncle’ is Prakash. This witness has not stated in her statement that while the accused had taken her to the bus, the other ‘blue uncle’ had gone to bring the other children and driver was fixing the bus. She has also not stated that the accused had placed his private part (penis) in her hands and that even on the earlier occasions, he had committed such acts.

16. The evidence on record thus indicates that the victim did

not know the name of the accused. She had disclosed to PW1 that one 'blue uncle' i.e, the attendant of the school bus had sexually abused her. It is to be noted that though the victim has not disclosed the name of the accused, PW1, the mother of the victim has lodged the FIR against the accused (Prakash). She has sought to explain this by claiming that the police had brought the accused to the police station and that the victim had identified him. No such statement is made either by the victim or by the Investigating Officer. Hence, if the evidence of identification is excluded for want of corroboration, there is no evidence to prove that the accused was the perpetrator of the crime.

17. The evidence of PW2 indicates that apart from the accused, there was another male attendant in the school bus, who also wore a blue uniform and the victim also called him 'blue uncle'. It was therefore necessary to ascertain as to which of these attendants, referred to by the victim as 'blue uncle' was involved in committing the crime. The Investigating Officer has deposed that he did not find it necessary to ascertain the identity of the perpetrator of the crime because the complainant (PW1) had named the accused in the FIR. As stated above, PW1 had lodged the FIR on the basis of the information given by the victim – PW2, who had not identified the accused by name

or by description. In such circumstance, it was incumbent upon the Investigating Officer to investigate the source of information given by PW1 and further to establish the identity of the accused person either by test identification or by any other mode. The Investigating Officer has neither held Test Identification Parade nor recorded the statements of the driver, lady attendant or the other attendant who was also wearing same colour uniform and who was also referred to as 'blue uncle'. There is thus no cogent and conclusive evidence to establish the identity of the accused.

18. It is also the case of the prosecution that the accused had sexually abused the victim in the bus after school hours. It is in the evidence of PW6 – Pooja, the teacher of Green Lawns High School that the victim used to commute to school by a school bus. She has deposed that after the class, she used to take the children to the gate and make them stand in separate rows at the assigned spot to board the bus. She has deposed that on 09/09/2014, after school hours, she made the victim stand in a row to board the school bus no.9. She has deposed that at about 10:55 a.m., she handed over the custody of the victim to the lady attendant – Ashiwini, who was on duty on bus no.9. She has stated in her cross-examination that male attendants are not allowed to

enter the school premises. She has deposed that the school buses wait outside the school premises at a distance of about 20 to 30 feet from the gate. All the children of nursery class gather at the gate and that as per the instructions, the lady attendant helps the children board the bus. She has deposed that the victim had not complained of previous sexual assault. She has also deposed that she had not seen any male attendant interacting with the victim or taking her to the bus.

19. The evidence of PW6 indicates that on the relevant date, the victim had boarded the bus at about 10:55 a.m. The evidence of PW1 indicates that the victim had returned home at the regular time i.e., at 11:00 a.m. This assumes significance as the charge against the accused is for sexually abusing the child in the school bus after school hours i.e., between 10:20 to 10:30 a.m.

20. The evidence of PW6 also indicates that she had handed over the child to the lady attendant– Ashwini. DW1- Ashwini has also deposed that she was on duty as a lady attendant in the bus no.9. Her duty was to pick up the children and to help them board the bus. She has deposed that the accused and one – Ramesh were the cleaners of the bus. She has stated that it was not the duty of the accused to pick

up the children from the bus as gents are not allowed in the school premises. The duty of the cleaners was only to stand at the gate to ensure safety of the children. DW1 -Ashwini has deposed that on the date of the incident, i.e., 09/09/2014, she had picked up the victim from the school. Since she was a child of tender years, she held her hand and helped her board the bus and made her sit on the seat. DW1 did not leave the bus thereafter. She has stated that on the relevant date, about 28 students were in the bus and that the victim and another boy alighted the bus at the second stop.

21. The evidence of PW6 – Pooja and DW1 - Ashwini indicates that the child was not in the company of the accused. She was brought to the gate by the teacher (PW6) and later, the lady attendant (DW1) had helped her board and take a seat in the school bus. The evidence of DW1 indicates that she was in the bus with the victim from the time the victim boarded the bus till she alighted at the regular bus stop. The evidence of this witness thus rules out the possibility of the accused sexually abusing the victim in the school bus.

22. It is also pertinent to note that the victim has deposed that the accused had inserted index and middle fingers in her vagina. The

evidence of PW3 – Dr. Pradeep Doshi, the Family Doctor of the complainant reveals that the complainant had brought the victim for examination as she was complaining of severe pain in her vagina and difficulty in passing urine. He gave some pain killers and referred her to the Government Hospital. The victim was examined by PW9 – Vikrant, Radiologist, J.J. Hospital. He has stated that the sonography reports of abdomen were normal except small rubull hyperechoic structures noted in the small bowel i.e., bowel worm infestation. He has explained in his cross-examination that worm infestation means infection of small bowel by worms.

23. Learned counsel for the accused has sought to link the congestion in the vagina to worm infestation. In this regard, it is pertinent to note that the victim was also examined by a gynecologists PW8 – Dr. Suvarna. This witness has deposed that on local examination, she had noticed that *“Fourchette and Introitus/ vagina congestion present. Other examination of genital was normal.”* She has stated in her cross-examination that worm infestation is caused through anus and not through vagina. She has admitted that worm infestation can spread over the vagina if proper care is not taken. She has admitted that in case of worm infestation, there can be itching and

scratching which can cause redness. She has further stated that it had not happened in the case of the victim (PW2).

24. The accused is alleged to have inserted middle and index finger in the vagina of child of about 3½ years of age. Such act in the normal course would have caused some injury to the genital of the victim. The evidence of PW8 reveals that the hymen of the victim was intact and that there was no evidence of injuries on or around the genitals of the victim. Thus, the evidence of PW8 though rules out the possibility of congestion being caused by worm infestation, it does not conclusively establish that the congestion was caused due to penetrative sexual assault.

25. It is pertinent to note that the victim (PW2) has stated in her cross-examination that even in the past, she had experienced pain in her private parts. She has deposed that there was burning sensation and itching and that the surrounding area had become reddish. This is also admitted by PW1, the mother of the victim. She has also admitted that even in the past, there was redness on the private parts of the victim and that she had applied cream. In such circumstances and particularly in the absence of any other injury on the genitals of the

victim, it cannot be said with certainty that congestion was caused due to penetrative sexual assault or attempt to commit penetrative sexual assault.

26. Having gone through the entire material on record, in my considered view, the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. Hence, the conviction and sentence cannot be sustained. Under the circumstances and in view of discussion supra, the Appeal is allowed. The impugned judgment and order dated 23/09/2019 passed by the learned Special Judge, Greater Mumbai in POCSO Case No.97/2015, is quashed and set-aside. The accused is acquitted of offences under sections 6 and 10 of POCSO Act, 2012. Bail bonds stand discharged. The accused shall furnish bonds before the Trial Court under section 437(A) of Cr.PC. within a reasonable time.

**PREETI H
JAYANI**

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PREETI H JAYANI
Date: 2021.12.21
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(SMT. ANUJA PRABHUDESSAI, J.)